

**SS-8 Determination—Determination for Public Inspection**

Occupation 02OFF Office Workers	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

I have read Notice 441 and am requesting:

- Additional redactions based on categories listed in section entitled "Deletions We May Have Made to Your Original Determination Letter"
- Delay based on an on-going transaction
- 90 day delay

**For IRS Use Only:**

**Facts of Case**

The worker submitted a request for a determination of worker status in regard to services performed for the firm from January 2018 to December 2018 as a video editing and production intern. The services performed by the worker included editing consumer videos, preparing DVD copies, categorizing hard drives, delivering consumer orders, and assisting on film projects. The firm issued the worker Form 1099-MISC for the year in question. The worker filed Form SS-8 as he believes he erroneously received Form 1099-MISC.

The firm's response states its business is video production. The worker was engaged as a technician. The services performed included running errands, doing graphics, editing videos, and labeling tapes. The worker was classified as an independent contractor as he did not have a set schedule; he worked when he wanted to work. Once the firm closed its store front, the worker worked at his leisure. There was no written agreement between the parties.

The firm stated it did not provide the worker specific training or instruction. If the worker reported to the firm's home, the firm would give him some assignments. The customer determined the methods by which assignments were performed. If problems or complaints arose, the firm was contacted and assumed responsibility for problem resolution. Reports and meetings were not required. The worker did not have a daily routine. Services were performed at the firm's home or the worker's home. The firm did not require the worker to personally perform services. The firm would hire substitutes or helpers, if needed, or complete the work. The worker stated the firm provided general training on video editing and production. The firm determined the methods by which assignments were performed. His routine consisted of working 6 to 8 hours per day. When the store was open, 90% of his time was spent at the firm's premises and 10% on deliveries. When the store closed, work was moved to the firm's residence. He continued to perform the same services. The firm required he personally perform services.

The firm stated it provided a labeler, ink, and computer. The worker provided a computer. The worker did not lease equipment, space, or a facility. The firm reimbursed the worker for mileage. Customers paid the firm. The firm paid the worker an hourly rate of pay; a drawing account for advances was not allowed. The firm did not carry workers' compensation insurance on the worker. It is unknown if the worker incurred economic loss or financial risk. The worker did not establish the level of payment for the services provided or the products sold. The worker stated the firm provided all needed supplies, equipment, and materials. The firm established the level of payment for the services provided or the products sold.

The firm stated the work relationship could be terminated by either party without incurring liability or penalty. It is unknown if the worker performed similar services for others. The worker did not advertise. There was no agreement prohibiting competition between the parties. The firm represented the worker as a team member to its customers. The work relationship ended when the worker returned to college. The worker stated he did not perform similar services for others. Services were performed under the firm's business name.

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## Analysis

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Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, a statement that a worker is an independent contractor pursuant to a written or verbal agreement is without merit. For federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties. Furthermore, whether there is an employment relationship is a question of fact and not subject to negotiation between the parties.

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. In this case, the services performed by the worker were integral to the firm's business operation. The firm provided work assignments by virtue of the customers served and assumed responsibility for problem resolution. These facts evidence the firm retained the right to direct and control the worker to the extent necessary to ensure satisfactory job performance in a manner acceptable to the firm. Based on the worker's education, past work experience, and work ethic the firm may not have needed to frequently exercise its right to direct and control the worker; however, the facts evidence the firm retained the right to do so if needed.

Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings. In this case, the worker did not invest capital or assume business risks. The term "significant investment" does not include tools, instruments, and clothing commonly provided by employees in their trade; nor does it include education, experience, or training. As the worker presumably used his computer for personal needs, it is not considered a significant investment. Based on the hourly rate of pay arrangement the worker could not realize a profit or incur a loss.

Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of the firm's business. Both parties retained the right to terminate the work relationship at any time without incurring a liability. There is no evidence to suggest the worker performed similar services for others as an independent contractor or advertised business services to the general public during the term of this work relationship. The classification of a worker as an independent contractor should not be based primarily on the fact that a worker's services may be used on a temporary, part-time, or as-needed basis. As noted above, common law factors are considered when examining the worker classification issue.

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a common law employee, and not an independent contractor operating a trade or business.

The firm can obtain additional information related to worker classification online at [www.irs.gov](http://www.irs.gov); Publication 4341.